IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9780 OF 2004

Mr. Mangesh Govind Patane)
Age: 57 years, Occ.: Business)
Shop at : Bombay Store,)
Main Road Bazarpeth, Khed, Tal.)
Khed, Dist. Ratnagiri.) ... Petitioner

Versus

1. Mr. Nagesh Vasant Kadam,)
age 50 years, Occ.: Service)

2. Mr. Nayan Vasant Kadam,)
age 33 years, Occ.: Business)

3. Mr. Narendra Vasant Kadam)
age : 31 years, Occ: Rikshaw)
Business, Respondent Nos.1 to)
3 are R/at : Municipal House)
No.56A/15, Bazar Peth, Khed,)
Tal. Khed, Dist. Ratnagiri.)

4. Smt. Alka Bhikaji Chavan,)
age: 36 years, Occ: Household)
R./at: At Post Chindrawali,)
Tal. & Dist.: Ratnagiri.)

5. Smt. Sunita Vasant Pawar,)
age :34 years, Occ. Household)
R/at: Room No.2, Vishnu Nagar)
Compound, Alibag, District)
Raigad.) ... Respondents

Mr. C.J. Sawant with Smt. Deepa Chavan i/b Mr. K.R. Jagdale for the petitioner.

Mr. G.S. Godbole for respondents 1 to 5.

CORAM: SMT. RANJANA DESAI, J.

DATED: 6TH APRIL, 2005.

ORAL JUDGMENT.:-

1. The petitioner is the original defendant and the respondents are the original plaintiffs. The plaintiffs

filed a suit for eviction on the ground of non-payment of arrears of rent and bonafide and reasonable requirement of the landlord. At the trial, the plaintiffs, inter alia, examined Ms. Samta Kadam, wife of plaintiff 2, who holds the power of attorney of the plaintiffs. The said power of attorney is at Ex-68. The defendant examined himself. The trial court held that the plaintiffs had not proved that the defendant is a defaulter. However, the trial court held that the plaintiffs have proved that the plaintiffs required the suit premises reasonably and bonafide and that greater hardship will be caused to the plaintiffs if the decree of eviction is not passed.

2. In the appeal carried from the said judgment and order, the lower appellate court held that the plaintiffs had proved that the defendant is a defaulter. The lower appellate court confirmed the findings of fact recorded by the trial court that the plaintiffs required the suit premises reasonably and bonafide for their personal use and occupation. The lower appellate court also confirmed the findings on hardship. Hence, the defendant has approached this court.

3. I have heard Mr. Sawant, the learned counsel appearing for the petitioner-defendant. Mr. Sawant contended that none of the plaintiffs have stepped in the witness box. The plaintiffs chose to examine one Ms. Samta Kadam, who is the wife of plaintiff 2 and, who holds the power of attorney of the plaintiffs. The

learned counsel contended that the power of attorney holder of the plaintiffs could not have deposed about the bonafide and reasonable requirement of the plaintiffs. In this connection, the learned counsel relied on a judgment of the Supreme Court in **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others, 2004 AIR SCW 7064**. The learned counsel drew my attention to the judgment of the Supreme Court in **Sarwan Singh Lamba and others v. Union of India and others, AIR 1995 SC 1729** and contended that even an obiter dictum of the Supreme Court is binding on this court. The learned counsel then drew my attention to yet another judgment of the Supreme Court in **Director of Settlements, A.P. and others v. M.R. Apparao and another, (2002) 4 SCC 638**. Relying on this judgment, he contended that under Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India. The learned counsel submitted that in view of this, the ratio of the judgment of the Supreme Court in **Janki Vashdeo Bhojwani's case (supra)** on the value and appreciation of evidence of the power of attorney holder would be binding on this court. He contended that inasmuch as the plaintiffs have not examined themselves, the plaintiffs' case that they reasonably and bonafide require the suit premises, is not proved.

4. As against this, Mr. Godbole, the learned counsel appearing for the respondents has heavily relied on the judgment of the Supreme Court in **Smt. Rumkubai since**

deceased by L.Rs. and others v. Hajarimal Dhokalchand Chandak and others, AIR 1999 SC 3089 to advance a submission that the evidence of a person holding the power of attorney of the landlord can be relied on by the court to judge whether the landlord really requires the suit premises reasonably and bonafide. The learned counsel also relied on the judgment of this court in **Nathulal Gangabaks Khandelwal and others v. Nandubai Bansidhar Khandelwal and others, 1984 Mh.L.J. 253**.

5. So far as the finding of fact on the question of landlord's reasonable and bonafide requirement is concerned, in my opinion, it is unassailable and cannot be characterised as perverse. It is well settled that in writ jurisdiction, this court can interfere with the concurrent finding of fact only if it is perverse. I have perused the evidence of Ms. Samta Kadam, the power of attorney holder of the plaintiffs. In my opinion, this evidence inspires confidence. Ms. Samta Kadam has stood firm about her case as regards requirement of the landlord even in the cross-examination. Nothing has come on record, in the cross-examination, to doubt the credibility of the evidence of this witness. From her evidence, it appears that out of the suit premises, which the plaintiffs are occupying, southern portion of 8' x 6.25' is being used by them for hair cutting saloon. Adjacent northern portion of 18' x 6.25' is middle room, which is used as store. Adjacent northern room of 8' x 6.25' is used as a kitchen and there is bathroom adjacent

to the kitchen. It appears that there are 11 members in the family of the plaintiffs and five, out of them, are women. Plaintiffs 2 and 4 are married. Plaintiff 2 is serving as a peon in a bank and plaintiff 3 runs the hair cutting saloon. Plaintiff 4 runs a rickshaw and he wants to start a business in the suit premises. The defendant has admitted in the cross-examination that there are various commercial complexes in the area. The suit was filed in the year 1993. The appeal came to be filed in the year 2003. Both the courts have held that during the relevant period, the defendant had made no efforts to find out any other accommodation. It has also come on record that the defendant has sold premises situated in Mamta Niwas to one Bhand in the year 1999. Therefore, his case that he requires the suit premises does not inspire confidence. In view of this, in my opinion, the view taken by the courts below cannot be disturbed. There is no perversity calling for this court's interference.

6. So far as the judgment in **Janki Vashdeo Bhojwani's case (supra)** is concerned, in that case, the Supreme Court had remitted the matter to the Tribunal with the following directions:

> "In our view, it is essential, before any further orders can be passed to first decide whether or not the appellants have a share in this property. We therefore,

remit the matter back to the Debt Recovery Tribunal to record a finding whether or not on the date the decrees were passed, the appellants were co-owners of the property at 38, Koregaon Park, Pune and if so, to what extent. In so deciding the Debt Recovery Tribunal will undoubtedly ascertain whether the appellants had any independent source of income and whether they had contributed for purchase of this property from their own independent income. The Debt Recovery Tribunal will also decide whether this property was the residence of the appellants at the time possession was taken. The Debt Recovery Tribunal shall permit the parties to lead evidence, both oral and documentary. It must be clarified that the burden of proving that the appellants have a share in the property will be on the appellants. The Debt Recovery Tribunal shall then forward its decision to this Court within a period of six months from today."

7. It is important to note that the Supreme Court had specifically directed the trial court to record the finding whether or not on the date the decrees were passed, the appellants were co-owners of the property at

38, Koregaon Park, Pune and if so, to what extent. The Tribunal was also to ascertain whether the appellants had any independent source of income and whether they had contributed for purchase of this property from their own independent income. It was specifically clarified that the burden of proving that the appellants have a share in the property will be on the appellants. Accordingly, the matter was remanded and it appears that the Tribunal permitted the power of attorney holder of appellant 2 to enter the witness-box on behalf of the appellants. Against the background of these facts, the Supreme Court observed in paragraph 12 of the judgment to the following effect.

> "12. In the context of the directions given by this Court, shifting the burden of proving on the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the matter of the appellants

and, therefore, he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal."

8. The Supreme Court then observed that -

"Order III, Rules 1 and 2 of the Civil Procedure Code empowers the holder of power of attorney to "act" on behalf of the principal. In our view, the word "acts" employed in Order III, Rules 1 and 2 of Civil Procedure Code confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

9. The facts with which the Supreme Court was concerned, are materially different from the fact of this case. In the case before the Supreme Court, there were certain acts which were done by the principal such as contribution towards purchase of property from the principal's independent income. It was in this context that the Supreme Court observed that the power of attorney holder cannot depose for the principal for the acts done by the principal. In this case, there is no question of the power of attorney holder deposing about any acts done by the principal. It is pertinent to note that the power of attorney holder is the wife of plaintiff 2. She is residing in the suit premises. Therefore, it cannot be said that she has no personal knowledge of the bonafide requirement of the landlord. Undoubtedly, even the obiter dictum of the Supreme Court is binding on me. It is also true that the law declared by the Supreme Court under Article 141 of the Constitution shall be binding on all the courts within the territory of India. However, in my opinion, the judgment of the Supreme Court in **Janki Vashdeo's case (supra)** is not applicable to this particular case, because the facts materially defer.

10. In this connection, I may usefully refer to the judgment of the Supreme Court in **Smt. Ramkubai's case (supra)**. In this case, the Supreme Court was concerned with the question whether the landlady bonafide required

the suit premises to set up a kirana business for her son. The landlady did not step into the witness box. Her son Bhikchand, who was her general power of attorney holder stepped in the witness box and deposed. The appeal court had taken a view that the bonafide requirement is in the first place a state of mind and might be something more and that could be established only by the landlady. The Supreme Court set aside the appellate court's judgment and confirmed the trial court's finding that the landlady bonafide and reasonably required the suit premises.

11. I may also refer to the judgment of this court in **Abdul Samad Makhadum Baksh Saikh v. Sudha Akant Parakhe, 1992 Mh.L.J. 647** where this court examined the expression "himself" in section 13(1)(g) of the said Act and observed as under:

> "The expression "himself" in section 13(1)(g) of Bombay Rents, hotel and Lodging House Rates Control Act, 1947 has been defined to mean not only the landlord alone but also his wife and children. It would cover the case of a family and all persons staying together including dependents and other relations and also in certain circumstances a servant. A dependent may not be a member of the family. Nevertheless if he is staying with the

> landlord and is depending upon him he would be considered as a member of the family and one whose requirements will have to be considered in the expression "himself".

12. I may also refer to the division bench judgment of this court in **Nathulal Gangabaks Khandelwal and others v. Nandubai Bansidhar Khandelwal and others, 1984 Mh.L.J. 253**. In that case, the learned single judge of this court referred the case to the larger bench as he disagreed with the view taken by another learned single judge of this court that the bonafide requirement is in the first place a state of mind though it may be something more and, therefore, it must be deposed to by the person who is requiring the premises under section 13(1)(g); that if the landlord does not step into the witness box to bring before the court legal evidence for proving his requirement, then it cannot be said that he reasonably and bonafide requires the premises as stated in section 13(1)(g) and that the landlord can delegate the authority to conduct a case but he cannot delegate the duty to depose. The Full Bench took a resume of the relevant judgments on the point and held that -

> "What is required to be done by a landlord for obtaining possession under section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 or under clause 13(3)(vi) of C.P. and Berar

Letting of Houses and Rent Control Order, 1949 for permission to determine the tenancy is to establish that he needs or requires the premises bona fide for his own use and occupation. The question whether the landlord so requires or needs the premises or the house and whether such need or requirement is bona fide or not would be a question of fact which of course the landlord would have to establish for success of his case. Neither the provisions of the Bombay Rent Act or the C.P. and Berar Rent Control Order make any provision as to how and in what way the landlord has to establish these two facts. In the absence of any specific provision as to how the need or the requirement has to be established, these facts could be proved by the landlord by adducing evidence which satisfies the Court or the Rent Controller. It may be that certain facts which are needed to establish these requirements are in the personal knowledge of the landlord alone. In such a case, it may be necessary for the landlord to step in the witness box and the authority concerned may not accept any other evidence. But if these two factors can be established by any other evidence than that of the landlord, by

putting on record circumstances which sufficiently indicate that the landlord requires the premises bona fide for his use and occupation, it is not necessary for the landlord to enter witness box and examine himself."

13. In view of this, in my opinion, the arguments advanced by the learned counsel for the petitioner that the power of attorney holder cannot depose on behalf of the landlord as regards his bonafide and personal requirement must fail. In view of this, I find no reason to interfere with the concurrent finding of fact recorded by the courts below. The petition is rejected.

14. At this stage, Mr. Sawant, the learned counsel for the petitioner states that the execution of the decree may be stayed for eight weeks as the petitioner wants to approach the Supreme Court. Mr. Godbole, the learned counsel for the respondents opposes. In the facts and circumstances of the case, execution of the impugned decree is stayed for a period of eight weeks on the petitioner and all adult members of his family filing usual undertakings in this court that within eight weeks, if the petitioner is unable to get any favourable order from the Supreme Court, they will handover vacant, peaceful and unencumbered possession of the suit premises to the respondents.

15. All concerned to act on the authenticated copy of this order.

(SMT. RANJANA DESAI, J.)